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Receding Confidence in Trust and Confidence?

A. INTRODUCTION

Although given the moniker of a “portmanteau obligation” by Lord Nicholls in *Malik v BCCI*,¹ there are undoubtedly limits to the operational capacity of the implied term of mutual trust and confidence in employment law. The decision of the Supreme Court in *James-Bowen v Commissioner of Police of the Metropolis*² may have slipped under the radar in light of the more recent decision of the Court of Appeal in *Uber BV v Aslam*³ and the publication of the Secretary of State for Business, Energy and Industrial Strategy’s Good Work Plan⁴ (responding to Matthew Taylor’s 2017 review⁵). But it is a salutary reminder of that reality. It provides a corrective to accounts of the implied term that bristle with over-confidence in extolling its worker-protective virtues and properties. In this way, it is a judgment that acts as something of a rejoinder to those commentators (including Lord Justice Elias recently writing extra-judicially⁶) who have heralded it as transformational and one of the most important common law developments in the field of labour law in recent years.

Having outlined the facts of, and decision in *James-Bowen*, I will discuss the implications of the case as a judicial precedent, before going on to analyse its wider impact on the common law. What does appear beyond dispute is that *James-Bowen* gives rise to an additional layer of complexity to what is an already intricate landscape.

B. THE FACTS OF *JAMES-BOWEN*

In *James-Bowen*, four police officers serving with their employers, the Metropolitan Police Service (“MPS”), participated in the arrest of a suspected terrorist. The individual concerned (“BA”) alleged that the employees had used excessive force and that he had been severely assaulted and injured. After BA’s complaints were investigated and largely dismissed by the MPS’s Directorate, BA raised civil proceedings against the MPS alleging that it was

¹ [1998] AC 20, 35A (Lord Nicholls).

² [2018] UKSC 40, [2018] 1 WLR 4021.

³ [2018] EWCA Civ 2748.

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⁵ See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766167/good-work-plan-command-paper.pdf, last accessed 21 January 2019.

⁶ See www.gov.uk/government/publications/good-work-plan, last accessed 21 January 2019.

⁶ Patrick Elias, “Changes and Challenges to the Contract of Employment” (2018) 38 OJLS 869, 887.

vicariously liable for the conduct of the four officers in the law of tort. When the claim came before trial, each of the officers refused to give evidence without special measures being put in place. Immediately thereafter, the Commissioner of the MPS settled BA's claim and paid damages of £60,000 and legal costs. However, more importantly, liability was admitted to BA accompanied by a written apology which expressed remorse for the "gratuitous violence" he had suffered at the hands of the four officers. The Commissioner of the MPS also issued a press release which stated that the circumstances surrounding the arrest of BA had been referred to the Independent Police Complaints Commission and that an investigation was being held into the refusal of the four officers to give evidence at the trial. Naturally, the four police officers felt that the MPS as their employer had effectively "thrown them under the bus": the written statement and press release seemed to endorse their culpability. The employees subsequently raised a claim against the Commissioner of the MPS seeking compensation for reputational, economic and psychiatric damage. They alleged that the MPS owed them a duty of care in tort and concurrently under the implied term in mutual trust and confidence in contract to safeguard their health, safety, welfare (including professional and economic welfare) and reputational interests in respect of the manner by which the MPS had conducted the defence to BA's claim and in any settlement or compromise of such proceedings. Although it has long been established that police officers hold a public office and are not employees,⁷ it should be noted that the Supreme Court was prepared to treat the Commissioner as an employer and each of the four officers as his employee on the basis that their relationship was closely analogous to employment.⁸ As such, it followed that it was appropriate in principle to rule that the Commissioner owes the same duties to his officers as an employer does to his employees.⁹

As a matter of logic, it might seem impractical to hold one party to obligations in favour of another in a litigation context. Where a party A is engaged in legal proceedings against party B in respect of the actions of party C (who is or was in the care of party B), it may seem lacking in pragmatism to impose a contractual, tortious or some other private law duty on B to prioritise the interests of C in those proceedings and to do nothing that would prejudice C's claims or defences. However, under the unique contractual principles applying to the employment relationship, such circumstances can seem quite legitimately to give rise to a claim of that sort. For example, where there is an employment contract, irrespective of the obligations imposed

⁷ *Fisher v Oldham Corp.* [1930] 2 KB 364.

⁸ *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, 497E-F per Lord Steyn and 505C per Lord Hoffmann.

⁹ *Mullaney v Chief Constable of West Midlands Police* [2001] EWCA Civ 700 per Clarke LJ.

on both the employer and employee by the law of tort, certain contractual implied terms in law arise by virtue of the existence of that very relationship. One of them is influenced by the law of tort despite its contractual source, namely the implied term enjoining an employer to exercise reasonable care for the physical and psychiatric health of its employees. And another of these contractual implied terms is the implied term of mutual trust and confidence. From this realisation, it is a small step to claim that one of the responsibilities owed by an employer to their employees – as an integral component of the obligations imposed by the implied term of mutual trust and confidence – is to offer them support in the context of litigation. In this way, the nature and scope of the implied contractual term of mutual trust and confidence would appear to be sufficiently wide to impose a derivative obligation on an employer B to conduct a defence to litigation raised against it by party A in a manner that protects its employees C from economic harm or injury to their reputations. This would simply build on existing case law that channels the implied terms of the employment contract towards the provision of support to employees.¹⁰

However, this was not the outcome reached in the Supreme Court's decision in *James-Bowen*. Instead, giving the judgment of the entire court, Lord Lloyd-Jones reasoned that the derivative duties imposed on employers which stem from the implied term of mutual trust and confidence did not, and should not, extend to an employer-owed obligation to conduct litigation in a way which protects employees from reputational or economic harm. The ground for such a finding was primarily based on the law of negligence in tort, ie that for such a concurrent duty of care in tort to arise in the first place, the tripartite test in *Caparo v Dickman*¹¹ would have to be satisfied. Since the Supreme Court could not accept that there was a case for the recognition of a tortious duty of care of such a hue, it stood to reason that a concurrent contractual duty in terms of the implied term of mutual trust and confidence could not arise either: the latter could not be recognised as it would result in the existence of a contractual duty more capacious in scope than any duty imposed by the former. To that extent, this decision is an illustration of the law of tort operating as a brake on the expansion of the derivative obligations owed by employers to employees under the implied term of mutual trust and confidence. One wonders if a similar outcome would have been reached by the House of Lords

¹⁰ *Cresswell v Board of Inland Revenue* [1984] IRLR 190.

¹¹ [1990] 2 AC 605. In *Robinson v Chief Constable Police of West Yorkshire* [2018] AC 736, Lord Reed reminded the courts that the recognition of a duty of care in tort will not always depend on the outcome of the application of the tripartite test. Its application will be unwarranted in *novel cases* where it cannot identify whether a duty of care ought to be recognised.

in *Malik v BCCI* if a case had also been made by the employees for the recognition of a concurrent duty of care in the law of tort in respect of stigma damages.

C. TORT-BASED REASONING IN THE IMPLIED TERMS

Of course, a central question that must be posed is whether curtailing the operation of the implied term of mutual trust and confidence in this way is a legitimate move for the common law to take. Do – and should – policy considerations underpinning the law of negligence be given such broad sway that they can check the expansion in the content and ambit of operation of the implied term? For example, counsel for the four police officers argued that the duty of care contended for was simply an expression of the overarching contractual implied term and that the law of tort governing duties of care had no bearing on the ambit of the former: this was an interpretation that would treat tort law as subordinate in a sense to “contractual” employment law. *James-Bowen* is controversial because it suggests that the law of tort has the capacity to cast a shadow so long that it can legitimately preclude the recognition of contractual obligations lying in employment law: *Yapp v FCO*¹² is another recent example of tort law obstructing an employee’s claim, where the Court of Appeal ruled that the rules on the remoteness of damages in respect of a breach of the contractual mutual trust and confidence term could not be permitted to be more favourable than (and thus, outflank) the remoteness rules under the law of tort. Hence, the common law governing the contract of employment is subordinated to the common law of tort to maintain doctrinal integrity and whilst policy issues are responsible for the recognition of implied terms in the first place,¹³ somewhat paradoxically, they can also be fatal to the recognition of duties that may on their face be derived from such contractual terms. I would argue that this hierarchy of interests may appear toxic in light of the powerful policy reasoning underpinning much of the common law contractual intervention into the employment relationship, namely the inequality of bargaining power of the employee.

However, perhaps an answer to the question why tort law should be allowed to play an influential role in such a context lies in an important observation made by Bogg and Freedland.

¹² [2015] IRLR 112. For commentary on this aspect of the decision in *Yapp*, see Douglas Brodie, “Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*” (2015) 44 ILJ 270, 271 and 276-278.

¹³ *Lister v Romford Ice and Cold Storage Co. Ltd.* [1957] AC 555, 576 per Viscount Simonds; *Liverpool City Council v Irwin* [1977] AC 239, 254F–255C per Lord Wilberforce; *Scally v Southern Health and Social Services Board* [1992] 1 AC 294, 306G–307F per Lord Bridge; and *Spring v Guardian Assurance Plc* [1995] 2 AC 296, 339H–340A per Lord Slynn, and 354B per Lord Woolf.

Bogg and Freedland have claimed that the inherent properties of the implied term of mutual trust and confidence are such that the term is infused with a tort-based quality in terms of its content, nature and scope.¹⁴ This is attributed to the fault-oriented and involuntary nature of the implied term, i.e. the implied term prescribes that an employer will involuntarily find itself liable to its employees in the event that it acts in a fault-based way, eg by destroying or severely undermining the employee's trust and confidence in the employment relationship. Of course, I accept the point that any claim that the implied term of mutual trust and confidence can be thought of as tort-like is somewhat controversial insofar as (1) its source is contract and (2) the implied term of the employment contract enjoining employers to exercise reasonable care has traditionally been understood as the principal implied term mimicking tort law.¹⁵ However, I would suggest that *James-Bowen* supplies additional support for Bogg and Freedland's claim to the extent that it was decided that the law of tort would preclude the acceptance of any obligation whose origin lay in the implied term. It does so inasmuch as the expansion in the content and scope of the implied term of mutual trust and confidence was treated as entirely dependent on there being a case for the parallel expansion in the duty of care in tort: where there is no case for the latter, there will be no alternative or ancillary argument lying in wait with the capacity to persuade the court that the ambit of the implied term ought to be expanded. This suggests that the Bogg and Freedland insight is accurate and that it should be understood that the implied term of mutual trust and confidence is much more tort-like than perhaps was initially thought. *James-Bowen* also draws our attention to two related, but additional points. First, that the courts now approach the contractual trust and confidence implied term in the same fashion as the implied term imposing a duty on the employer to exercise reasonable care. As such, where the courts have disposed of the argument that a duty of care in tort ought to be recognised, this will lead seamlessly to the dismissal of any parallel argument that a similar obligation ought to be derived from either of these implied terms. Second, it draws out the irony of the some of the reasoning adopted by the House of Lords in *Johnson v Unisys*:¹⁶ here, the majority of the Law Lords held that they had no option but to dismiss a parallel argument for the imposition of a duty of care on employers in the law of tort as a result of their decision

¹⁴ Alan Bogg and Mark Freedland, "The Wrongful Termination of the Contract of Employment" in Mark Freedland *et al.* (eds), *The Contract of Employment* (OUP 2016) 537, 545-549; see also Alan Bogg and Hugh Collins, "Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd.*" in Paul S Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2017) 185.

¹⁵ Mark Freedland, *The Personal Employment Contract* (OUP 2003) 141, 146.

¹⁶ [2003] 1 AC 518.

not to enlarge the role of the trust and confidence implied term to regulate dismissal procedures. In other words, that tort law was to be treated as subordinate to “contractual” employment law, which is exactly the opposite approach to that taken in *James-Bowen*.

D. CONCLUDING THOUGHTS

James-Bowen is yet another reminder of the relative poverty of the common law to effect progressive social change in favour of workers. In a 2016 blog, I offered a few remarks about the regenerative capacity of the common law in the employment context.¹⁷ This sentiment was subsequently reinforced by the powerful judgment of Lord Reed in *R (on the application of UNISON) v Lord Chancellor*.¹⁸ Although *Unison* was a case about the enforcement of statutory employment rights, it did afford his Lordship the opportunity to point out that access to the courts and tribunals to vindicate employment rights is a fundamental principle of the common law. The paradox of *James-Bowen* is that it provides support for the opposite conclusion (articulated in Lord Justice Elias’s sentiment in the same article cited above)¹⁹ that there are limits to the extent to which the judiciary can use the common law to mould obligations in favour of workers. This is also a theme picked up by Lord Justice Underhill in the aforementioned decision of the Court of Appeal in *Uber BV v Aslam*, where he states that “...courts are anxious so far as possible to adapt the common law to changing conditions, but the tools at their disposal are limited...”.²⁰

Of course, since *Malik v BCCI* was decided in 1997, we now know that there are many constraints prescribed by the common law on the functioning of the implied term of mutual trust and confidence. *James-Bowen* simply heralds the introduction of an additional exception. First, there are those limitations that arise by virtue of the small print of the term itself, eg the employer’s “reasonable and proper cause” defence. Secondly, as all labour lawyers are well aware, owing to the constitutional roadblock set up by the statutory unfair dismissal jurisdiction, the implied term is simply inoperative where the manner of an employer’s dismissal would destroy an employee’s trust and confidence in the employment relationship.²¹ Thirdly, in certain circumstances, although the implied term of mutual trust and confidence may be breached and give rise to a remedy, the common law may restrict the nature or range

¹⁷ See <https://blog.oup.com/2016/06/filling-void-brexite-employment-law/> last accessed 21 January 2019.

¹⁸ [2017] 3 WLR 409.

¹⁹ Elias, “Changes and Challenges to the Contract of Employment” (n 6) 872-873 and 885-886.

²⁰ *Uber* (n 3) [164] (Underhill LJ).

²¹ *Johnson* (n 16).

of any remedies, such as by preventing a claimant from accessing an award of damages.²² *James-Bowen*'s contribution to this "litany of limitation" is to demonstrate how the implied term may be stymied to so that it cannot give rise to additional obligations when it comes into close proximity with other important doctrines of private law (another – not considered in detail here – is the rationality standard of review which constrains employer decision-making in general and was recently imported from contract law²³ into the common law regulating the contract of employment by virtue of *Braganza v BP Shipping Ltd.*).²⁴ Seen from this perspective, *James-Bowen* is a case which throws into sharp relief how the judiciary will intuitively prioritise tort-based modes of analysis over contractual reasoning to subordinate contractual obligations stemming from the operation of the implied term of mutual trust and confidence to policy considerations. The end result is that policy will "trump" contractual principle as far as the implied term of mutual trust and confidence is concerned, which exposes deep-seated anxieties about its broader capacity and role to forge a progressive reformulation of the law governing the employment relationship. The question is whether it is now time to have receding confidence in trust and confidence, and by the same token, receding confidence in the common law judges?

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²² *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 WLR 55.

²³ Which itself was originally imported into contract law from public law.

²⁴ [2015] UKSC 17, [2015] 1 WLR 1661. Although Lord Neuberger gave a dissenting opinion in *Braganza*, at [2015] 1 WLR 1661, 1688G, he questioned whether the implied term of mutual trust and confidence has any role to play where the rationality standard of review is operative to subject the employer's conduct or decision-making to scrutiny: "Once it is accepted that [the employer has to act or take decisions]... with "honesty, good faith and genuineness" and... to avoid "arbitrariness, capriciousness, perversity and irrationality", I do not see what trust and confidence add[s]." This is a significant point that was not addressed by the majority of the Justices of the Supreme Court in *Braganza* in their respective judgments.

²⁵ A version of this case note was published on the UK Labour Law blog at <https://uklabourlawblog.com/2019/01/21/receding-confidence-in-trust-and-confidence-james-bowen-v-commissioner-of-police-of-the-metropolis-david-cabrelli/>.